INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	25
Appendix A	26
Appendix B	29

CITATIONS

Cases:

Commissioner v. *Sunnen*, 333 U.S. 591	24
Helvering v. *Taylor*, 293 U.S. 507	19
Marion & Rye Valley Ry. Co. v. *United States*, 270 U.S. 280	18
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53	24
United States v. *Commodities Trading Corp.*, 339 U.S. 121	16, 18
United States v. *Cors*, 337, U.S. 325,	5, 6, 7, 8-11, 13, 16, 18, 19, 21, 22, 23, 24
United States v. *Felin & Co.*, 334 U.S. 624	16, 18
United States v. *Miller*, 317 U.S. 369	9, 24
United States v. *Toronto, H. & B. Nav. Co.*, 338 U.S. 396	18
United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266	18

Statutes:

Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1242	2
Titles V, VI, VII	15
Section 902	7
Section 902(a)	2, 8, 26
Section 902(b)	27
Section 902(c)	27
Section 902(d)	28
Section 902(e)	28
Merchant Ship Sales Act, 1946, 60 Stat. 41, 50 U.S.C. App., Supps. I-IV, 1735 *ff.*	15
National War Agencies Appropriation Act, 1946, 59 Stat. 473	23
Naval Appropriation Act, 1947, 60 Stat. 481	23

Statutes—Continued Page

Ship Warrants Act of 1941, 55 Stat. 591 14
61 Stat. 451 8
Second Supplemental Appropriation Act, 1948, 61 Stat. 605 23
Third Supplemental Appropriation Act, 1951, P.L. No. 45, 82nd Cong., 1st Sess., June 2, 1951 23

Miscellaneous:

22 Comp. Gen. 497 20
22 Comp. Gen. 608 20
89 Cong. Rec. A4957-9 21
Document 20 ("Compilation of Material on the Determination and Payment of Just Compensation for Vessels Requisitioned Under Section 902 of the Merchant Marine Act, 1936"), H. Reps., Committee on Merchant Marine and Fisheries, 78th and 79th Congs. 20
Executive Order 9387, 3 C.F.R. 1943 Supp., p. 48 21
Hearings Before the House Committee on Merchant Marine and Fisheries on H.R. 2731, 78th Cong., 1st Sess., (June 10, 1943), pp. 5-8 20
H. R. 2731, 78th Cong., 1st sess. 21
Proclamation No. 2352, 3 C.F.R. Cum. Supp., p. 114 4
Proclamation No. 2914 (Dec. 16, 1950), 15 Fed. Reg. 9029 8
Report of the Advisory Board on Just Compensation to the War Shipping Administration 31

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN-HAWAIIAN STEAMSHIP CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on August 13, 1951.

OPINIONS BELOW

The District Court for the Southern District of New York wrote two opinions. The first (R. 1580-1634), is reported at 85 F. Supp. 815; the second (R. 1657-1678), at 92 F. Supp. 785. The opinion and the dissenting opinion in the Court of Appeals (R. 1697-1704) are reported at 191 F. 2d 26.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1951 (R. 1704). On November 2, 1951, the time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Jackson, to December 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit to recover just compensation for a cargo ship requisitioned during World War II, the court below improperly approved an award which, in violation of Section 902(a) of the Merchant Marine Act of 1936, included enhancement due to the causes which necessitated the taking.[1]

STATUTES INVOLVED

The pertinent provisions of the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101, 1242 are set forth in Appendix A, *infra*, pp. 26-29.

The immediately pertinent portion of Section 902(a), 46 U.S.C. 1242(a), reads as follows:

> Whenever the President shall proclaim that the security of the national defense makes it

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[1] If certiorari is granted, the Government will also urge that the court below erred in (a) affirming an award which fails to give due effect to, and to take proper account of, the Government's restrictive controls on earnings and operations in 1941 and 1942; (b) affirming an award which gives improper weight to reproduction cost and fails to give adequate effect to the vessel's depreciation resulting from age; and (c) holding that the vessel should be valued as of the date of her delivery to the Government rather than the date of her loss.

advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.* [Italics supplied].

STATEMENT

This was a libel in admiralty, on a policy of war-risk insurance, to recover just compensation for the loss of a ship. The use of the ship, the S.S. *Alaskan,* owned by respondent, was requisitioned on June 12, 1942, by the War Shipping Administration, as part of the wartime requisition program under which the Administration acquired almost our entire ocean-going cargo fleet within a few weeks, beginning in April, 1942 (R. 1535, 1549). The War Shipping Administration's standard form requisition time charter contained war risk insurance provisions, including an option to the owner, in the event of loss, of having the loss fixed on the basis of "just compensation to be deter-

mined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended." The *Alaskan* was sunk by enemy action on November 28, 1942. Respondent, after applying to the War Shipping Administration for just compensation under the above insurance option and rejecting an offer of $776,003, brought this libel in accordance with Section 902 (R. 1535-1538). The main issue involved was that of valuation.

The *Alaskan* was a dry cargo freighter built by the United States Shipping Board during the first World War and sold to respondent in 1928. She had a capacity of 10,350 deadweight tons, a speed of 12.6 knots, and physical characteristics roughly comparable with most of the standard type of cargo ships operating before the war, and equivalent to the Liberty ships which the War Shipping Administration built in large numbers during World War II (R. 1544, 1546, 1135).

Respondent paid the Government about $289,100 for the vessel in 1928, and it made additions and improvements amounting to somewhat more than $237,000, so that the respondent's total investment was about $526,519 (R. 1543). The parties stipulated that the *Alaskan's* value on September 8, 1939, when the President issued his proclamation of limited national emergency, Proclamation No. 2352, 3 C.F.R. Cum. Supp., p. 114, was not in excess of $450,000 (R. 1496). The vessel was 24 years old when she was sunk.

The admiralty court referred the case to a commissioner, who found the value as of the date of requisition, June 12, 1942, and also as of the date of loss, November 28, 1942, to have been $983,250. With appropriate adjustments for the seventy-five per cent statutory part-payment previously made by the War Shipping Administration and for interest on the balance due, the commissioner allowed this amount (R. 1570). On exceptions duly taken by both parties to the commissioner's report (R. 1572, 1576), the District Court approved the report, except for a change in the amount of interest, here immaterial (R. 1580-1634).[2]

The Government appealed, contending on various grounds that the decree overvalued the ship; among the errors assigned was the failure of the commissioner and the District Court to apply the enhancement clause of Section 902(a) of the Merchant Marine Act (R. 1641-1643). While that appeal was pending, this Court announced its decision in *United States* v. *Cors*, 337 U.S. 325 (June 13, 1949), for the first time interpreting the enhancement clause and applying it to judicial determinations of just compensation. Thereupon, the Government filed a motion in the Court of Appeals, ask-

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[2] The commissioner's report was dated July 14, 1948 (R. 1570). The Government's exceptions were filed on October 1, 1948 (R. 1571-1573), and the libelant's on October 5, 1948 (R. 1576-1579). The District Court's main opinion was rendered on January 21, 1949 (R. 1625), and its supplemental opinion on February 15, 1949 (R. 1634). The decree was entered on March 4, 1949 (R. 1635-1636).

ing remand of the case to permit the Government to introduce further evidence showing, in consonance with the *Cors* decision, the extent to which the value of the *Alaskan* had been enhanced by the Government's wartime need for ships (R. 1648).[3]

This motion the Court of Appeals denied in January 1950, with leave instead to the District Court to hear it (R. 1655); on the same day, a like motion was filed in the District Court (R. 1659). Leibell, J., who had also been the judge at the hearing on the merits, denied the motion. He placed his decision on three major grounds: (1) that the *Cors* case did not really represent a supervening change in the law, (2) that it had been open to the Government, from the beginning, to present its evidence of the effect on the *Alaskan's* value of the Government's need for shipping, so that it was within the Court's discretion to refuse to hear further evidence, and (3) that the proffered evidence was irrelevant to the issue of enhancement, properly interpreted. (R. 1657-1678).

With the permission of the Court of Appeals, the Government then amended its appeal from the original decree to include an appeal from the denial of this motion to take further evidence of enhancement (R. 1679-1688). On the consolidated appeal, the court below, by a 2-1 decision, affirmed the decree and the denial of the motion, relying

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[3] The evidence which the Government proffered is summarized *infra*, pp. 12-15.

substantially on the District Court's opinions (R. 1697-1699). Judge Clark filed a dissenting opinion, which encompasses the essence of the Government's position (R. 1700-1704).[4]

REASONS FOR GRANTING THE WRIT

In an important decision which the dissenting judge has rightly called "a precedent dangerous in its far-reaching implications" (R. 1704), the Court of Appeals has given the narrowest of readings to the "enhancement" clause of Section 902 of the Merchant Marine Act, as well as to this Court's significant decision in *United States* v. *Cors*, 337 U.S. 325. Despite the fact that the value of $983,250, which the court found for the *Alaskan* as of June and November 1942, was more than double its value in September 1939, none of this large and rapid enhancement during the defense period was attributed to "the causes necessitating the taking or use"; in addition, the Government was denied the opportunity to make a further showing, after the meaning of the "enhancement" clause had been made clearer in *Cors*, of how much of the increase represented prohibited enhancement. The case is important both for its effect on the considerable number of cases still pending, which involve determinations of just compensation for ships requisitioned during World

[4] Judge Clark had been a member (along with Judge Joseph C. Hutcheson, Jr., and Justice Irwin Untermeyer) of the Second Advisory Board on Just Compensation.

War II,[5] and for its impact in the present or any future emergency calling for a new requisition of merchant shipping.[6] The Court of Appeals' ruling frustrates, we believe, the attempt to breathe vitality into Congress' command, expressed in the enhancement clause, to eliminate unconscionable wartime increases in shipping values.

1. In the *Cors* case this Court went far toward settling the question of what are the "causes necessitating the taking", enhancement from which must be excluded in valuing requisitioned merchant vessels for just compensation purposes. It is clear that enhancement stemming from any of three sources is excludable. Analysis suggests the three may often be mutually interdependent in an economic sense, but they may be considered one at a time. The three are these:

First, *a prospective taking of the vessel in ques-*

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[5] At the present time, there are pending in the courts just compensation suits involving the following numbers of requisitioned ships and the following amounts of money:—(1). Ships requisitioned for title: 48 ships classified by the Maritime Administration as large vessels. The value claimed by the owners aggregated $37,207,134.95. The War Shipping Administration's valuation aggregated $14,173,866.76. The unpaid balances involved in litigation amount to $27,354,-145.97. (2). Ships requisitioned for use: 41 large vessels for which pending unpaid claims aggregate $32,074,487.42. These 89 ships involve 74 separate suits, in the district courts or the Court of Claims.

[6] The emergency power to requisition ships in World War II was ended July 25, 1947. 61 Stat. 451, 454. The President's Proclamation of December 16, 1950 (Proclamation 2914, 15 Fed. Reg. 9029) "proclaiming the existence of a national emergency" has revived the power to requisition under Section 902(s) of the Merchant Marine Act (*infra*, p. 26).

tion, reasonably probable (337 U.S. at 334, 335). As we read the decision, this much is assimilable to the pre-*Cors* eminent domain rule of *United States* v. *Miller,* 317 U.S. 369, 374-379. The prospect of a special need by the Government leading to a probable taking gives rise to a speculative increase in the value of land or in the value of each member of a class of similar ships—in this case, ocean-going dry-cargo carriers of the *Alaskan's* type.

Second, *the previous taking of similar vessels* (337 U.S. at 334, 335). To the extent that previous requisitions of tonnage reduce the space available to meet the demand of private shippers, the value of the ships remaining in the market is enhanced. The dissenters in *Cors* questioned whether this element of enhancement was barred by the enhancement clause, the objection being that the increase from this source was due to private demand and not to the Government's need which necessitated the taking. 337 U.S. at 343. But the Court concluded that this item was excludable.[7]

Third, *the Government's intervention in the shipping market by purchase, voluntary charter, and all other means short of direct requisition* (337 U.S. at 334, 335, 336). It is this element on which the Government mainly relies. This Court spoke

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[7] We treat enhancement due to the removal of vessels from the private market by government charter or purchase, rather than by requisition, as part of the third category of excluded enhancement.

of the "Government's need for vessels," which it defined as a "need for the precise ship taken, for the type or class of ship taken, or for ships which perform the same or related functions." 337 U.S. at 334. It is clear that after September 1939 this defense and war need was sought to be satisfied in ways other than the actual requisition of ships: —through charters, purchases, and the use of cargo space on private carriers. That the Court did not equate the Government's intervention in the market with use of the requisitioning power alone is clear from the opinion which carefully distinguishes the Government's need from its actual takings. 337 U.S. at 334-6. Moreover, although the first requisitions did not occur until July 1941,[8] and requisitioning did not begin on a large scale until April 1942 (R. 1199-1201), the Court expressly held that enhancement occurring before May 1941 was excludable from the determination of just compensation. 337 U.S. at 334.

In short, the *Cors* case, as we read it, requires the exclusion of all enhancement in a ship's value attributable to the Government's defense and wartime need for tonnage and its consequent intervention in the shipping market, whether through compulsory requisition or through voluntary purchase, chartering, or hiring of vessel space. A sharp increase in the value of ships remaining in

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[8] All of the requisitions in July 1941 were of laid-up foreign tonnage.

private hands follows close upon such broad-scale public intervention because of the prospect that the remaining vessels will be used in the Government's expanding defense and war program, combined with the fact that the supply of vessels is limited and the total demand great and increasing. The direct result is the creation of a sellers' market in which normal prices are highly inflated because of the Government's special need (337 U.S. at 333-334)—inflated values which the Government need not pay as part of constitutional "just compensation."

This construction of the "enhancement" clause accords fully with the clause's long legislative history which shows that its prime purpose was to require vessels to be requisitioned at less than their war or emergency prices, such as were paid during World War I. Congress intended that requisition awards should follow the levels of peacetime prices, of the "value prior to the emergency", of "normal values", of values before the "war comes on".[9] Such emergency, abnormal, and wartime market prices largely result from the Government's special and extraordinary demand for ships and shipping space in time of stress, and the "enhance-

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[9] This legislative history is set out and discussed at length in the Government's brief in *United States* v. *Cors*, No. 132, October Term, 1948, pp. 25-40, and 92-105, to which the Court is respectfully referred. The same history is referred to by Judge Clark below as wholly "one way" in its approach (R. 1700).

ment" clause was designed as the device to contain this inflation in values.

2. If this type of enhancement due to the "Government's need for vessels" must be excluded, it is undeniable that the 110% increase in the *Alaskan's* 1942 value (as found below), over its September 1939 value, contains a very substantial measure of prohibited inflation which the courts below made no effort to excise.

a. It is known to everyone that long before we entered World War II the Government's defense and allied-aid program was making large and increasing use of ocean shipping, and it is obvious that ship values responded to this pressure. At the outbreak of the war in Europe, in September 1939, the shipping market was depressed; tonnage existed in excess of demand. After the fall of France in June 1940, the American defense program, which had been begun a year earlier, increased its tempo tremendously and at an accelerating rate. The newly acquired foreign bases had to be built and supplied. Immense quantities of strategic and critical materials, including rubber, tin, manganese, and chromium, were imported for Government account or to fill Government defense contracts. In early 1941, lend-lease began, and the President called for a pool of 2,000,000 tons of existing shipping to move arms to the Allies. The upward movement in the use of the nation's merchant shipping facilities for Government purposes con-

tinued throughout 1941, and, of course, on into 1942.

These wholesale Government shipping activities may be numerically summarized as follows: [10] (i) in 1939, American private shipping interests owned 681 large cargo ships, aggregating about 5,000,000 tons. Between September 1, 1939, and December 31, 1941, private persons acquired 68 new ships, all built by the Maritime Commission, aggregating 700,000 tons, for a total of 749 ships and 5,700,000 tons. In the same period of time, from this fleet of 749 ships, no less than 321, or 43%, were diverted to complete Government use for defense purposes, through purchase and charter alone.[11] (ii) The Government's defense and allied-aid program hired so much shipping space as to account for 100% of the increase of exports, and 70% of the increase of imports, carried by privately owned and operated United States flag ships in 1941 over 1939.

b. At the same time, the ship market naturally responded with a "spiraling of prices" (337 U. S. at 333). Values, which had averaged roughly $15 to $20 a ton in 1939, reached $50 a ton in December

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[10] Evidence supporting these and other precise factual conclusions, as well as the economic correlations to be drawn from them, was proffered to the courts below on the motions for further findings. *Supra*, p. 6.

[11] At the same time, of course, a gigantic building program was undertaken, idle foreign ships were requisitioned, and obsolete laid up ships were released for use. But these sources of tonnage, except for the 68 new ships released to private hands, remained in the Government's hands to meet needs in addition to those which caused it to intervene so heavily in the private market.

1940, and $100 a ton in July 1941. This was the peak. On July 14, 1941, the Ship Warrants Act (55 Stat. 591) was passed. This Act permitted the Maritime Commission to fix private charter rates, by the device of issuing warrants which were required as a condition to obtaining priorities in the use of port facilities—loading, towage, docking, fuel, repair services and the like. Thereafter, the Maritime Commission was able to impose ceilings on charter rates and to force them down to these ceilings, with some consequent decrease in theoretical market value. The general requisition (in April 1942) did not take place until this partial reduction had been accomplished, so that requisition prices should presumably not reflect all of the exorbitant increase in rates, even if the "enhancement" clause be disregarded. See R. 1195-1202. But 1942 values remained far closer to the 1941 maximum than to 1939 or even 1940 levels.[12] If one thing is clear, it is that a large part, if not all, of the skyrocketing of the value of cargo ships in the period from 1939 to 1942 must have been directly due to the Government's use of ocean shipping for defense and allied-aid, *i.e.*, to the Government's defense and war need for vessels.[13]

3. There is also no doubt that the courts below

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[12] The award below amounts to $95 per ton in 1942 (R. 1582, 1701).

[13] Expert economic testimony is available, and was proffered below on the motion for further findings, that at least 80 per cent of the increase in values between 1939 and 1941 was attributable to the government's defense need for shipping.

did not at any time consider this type of prohibited enhancement or seek to measure and exclude it.

a. The commissioner squarely based his award on 1941 values (R. 1562-1563; 1589-1590, 1622-1623), which, as we have just shown, were necessarily inflated by the Government's shipping activities. As a first "check" on this basic figure, he used "reproduction cost". This could not afford a valid check, since all the shipbuilding facilities of the country were preempted by the Government and were unavailable to private persons. Moreover, reproduction cost, at all normal times, has generally exceeded the value of dry-cargo ships to American flag operators, as shown by the fact that the Government has been obliged to build ships and sell them at reduced prices or with a construction subsidy calculated to equate the sales price to foreign costs. See Merchant Marine Act, 1936, as amended, 49 Stat. 1985, Title V, VI, and VII; Merchant Ship Sales Act, 1946, as amended, 60 Stat. 41, 50 U.S.C. App., Supps. I-IV, 1735*ff*. As his second "check" on his award, the commissioner resorted to earnings, but earnings obviously reflect the Government's intervention in the free market.

The commissioner's passing and cryptic references to the "enhancement" clause (R. 1542, 1562) mean either that in his view (i) the clause prohibited only those value-increases accruing after we entered the war on December 7, 1941, or (ii) the

clause merely directed that account be taken of the *depressive* effect on ship prices of the governmental controls which followed upon the Ship Warrants Act (*supra*, p. 14); or (iii) on the contrary, the clause required him to disregard these controls and add to the respondent's just compensation the amount by which the controls had driven the *Alaskan's* actual 1942 value down from the 1941 peak.[14] Whichever of these divergent and erroneous views the commissioner had,[15] it is plain that he never considered that the "enhancement" clause had anything to do with the increase in values which accrued from 1939 through 1941, and that he did not attempt to eliminate any enhancement, included in the 1941 values, which could be traced to the Government's need.

b. The District Court's original opinions (R. 1580-1634), which likewise made slight mention of prohibited enhancement (R. 1597-1598), also show that it took no account whatever of *increases* in value occurring prior to 1942. The court's major concern was with justifying its consideration of the alleged *depressive* effects of governmental price and other controls in 1942, which the libelant contended should be disregarded (see R. 1591-1615,

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[14] The dissenting judge below seems to have taken this third view of the commissioner's reading of the clause. See R. 1701, 1702, 1703.

[15] The *Cors* case expressly rejects the first (337 U.S. at 334), and implicitly refutes the second and third. The third is also contrary to *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, and *United States* v. *Felin & Co.*, 334 U.S. 624.

1622-1623, 1626-1634). And in its opinion on the motion for further findings (R. 1657-1678), the court rejected, as a matter of law, the Government's view of the types of enhancement excluded by the statute. It flatly held that evidence of "the extent of the Government's activities in the market from September 1939 on, as a shipper or berth or space charterer" [similar to that summarized above at pp. 12-13] was "of doubtful relevancy and would have no probative value on the issue" of enhancement (R. 1675), and would not change the result of the original proceeding (R. 1676). In its view, the clause covered only the first two of the three categories outlined above at pp. 8-10.

c. Similarly, the Court of Appeals, in affirming on the District Court's opinions (R. 1699), necessarily construed the enhancement clause as unconcerned with value-increases attributable to the Government's intervention in the shipping market by purchase, charter, space-hiring, and other means short of direct requisition (*supra*, pp. 9-10). As the dissent points out, the court below commits the fundamental substantive error of ignoring the purpose of the clause which was to exclude such increases in ship values as were due to the Government's defense shipping activities in 1939-1941 (R. 1701, 1703-1704).

d. Thus, entirely apart from the new evidence which the Government sought to introduce after judgment, the $983,250 award cannot stand because

it is plainly based on an improper and unduly narrow view of the enhancement which is prohibited by Section 902 of the Merchant Marine Act. From judicial notice and evidence in the original record (see R. 1606-1613, 1616-1618 1632, 1666*ff*), the trial court knew enough about the public intervention in the ocean shipping market to require it to seek to measure the enhancement in the *Alaskan's* value due to those activities.[16] See *United States* v. *Cors*, 337 U.S. at 335-336. In this inquiry, the burden would be on the libelant both to negate the existence of a general increase in value for this cause and to show that the *Alaskan* did not participate in any such general increase.[17] But no such in-

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[16] In its opinion on the motion for further findings, the District Court appears to have thought that certain statements of Admiral Land to a Congressional committee constituted admissions on the Government's part that there was no "enhancement" included in 1941 values (see R. 1666, *et seq.*, esp. 1669, 1674). Aside from the propriety of using such statements and similar material submitted to legislative bodies for legislative purposes as binding on the Government in later litigation, we may note that, at the time the statements were made, Admiral Land and the War Shipping Administration —whose view of prohibited enhancement was, in any case, much too limited—expressly recognized that their awards included at least some of the prohibited factor, an inclusion based on the fear that the enhancement clause might be held unconstitutional and that the courts would grant excessive judgments (R. 1701-2). See also *infra*, pp. 20*ff*.

[17] Cf. *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 285; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273; *United States* v. *Felin & Co.*, 334 U.S. 624, 631, 641-642; *United States* v. *Toronto, H. & B. Nav. Co.*, 338 U.S. 396, 406; *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 128.

Nothing in the record suggests that the *Alaskan* differed substantially from other dry-cargo ocean vessels. The entire ocean merchant fleet was substantially fungible for shipping

quiry was made, and the trial court did not even go as far as the Court of Claims which posed the question in the *Cors* case and found some enhancement but failed to measure it properly. The award is therefore tainted with a fundamental error of law requiring reversal and further hearings. Cf. *Helvering* v. *Taylor,* 293 U.S. 507.

4. The courts below also erred in refusing to permit additional evidence to be introduced by the Government—although the burden was not its—so that proper and discriminating findings could be made as to the scope and amount of excluded enhancement. This refusal was justified on the ground that the evidence was proffered by the Government under the theory that there was a supervening change in the law after the appeal, whereas the *Cors* decision did not really change the existing law. But a realistic appraisal of the controversial history of the enhancement clause since 1942[18] shows that the *Cors* case at least constituted a definite clarification in a field in which great doubt and dispute had theretofore existed.

a. In November 1942, the Comptroller General took the position that the cause necessitating the taking was the wartime emergency; that this emergency dated from the President's proclamation of

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purposes, and the ships reacted in price in the same way during the 1939-1941 period. When requisition came in the Spring of 1942, it came for almost the entire industry at once.

[18] This history is set forth in detail in the Government's brief in the *Cors* case, October Term, 1948, No. 132, at pp. 90-113.

a limited national emergency on September 8, 1939; and that, as a result, the amount by which a given ship increased in value between September 8, 1939, and the time of its requisition constituted the measure of excludable enhancement. 22 Comp. Gen. 497; 22 Comp. Gen. 608. The Comptroller General subsequently made clear that he did not regard as forbidden enhancement so much of the rise as could be attributed to a rise in the general price level, due to improved economic conditions. Thus, he added to a ship's 1939 value an amount proportional to the rise in the price index for shipbuilding at the time of valuation—usually from 30% to 33% during 1942.

The War Shipping Administration at first opposed this view, taking the position that the causes necessitating the taking did not come into being at least until the proclamation of a full national emergency, on May 27, 1941.[19] Further, the Administration believed that ship values had reached a maximum at about this time and that, thereafter, because of its efforts to bring about reductions in charter rates, values declined. See Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 2731, 78th Cong., 1st sess. (June 10, 1943), pp. 5-8. It would follow from this

[19] The documents comprising the early steps in the controversy between the Comptroller General and WSA, many of which are in the form of letters, are set forth in Doc. 20 ("Compilation of Material on the Determination and Payment of Just Compensation for Vessels Requisitioned Under Section 902 of the Merchant Marine Act, 1936"), printed by the House of Representatives' Committee on Merchant Marine and Fisheries, 78th and 79th Congs.

position that values after May 27, 1941, included no prohibited enhancement whatever.

As a result of the Comptroller General's ruling, the War Shipping Administration, in December 1942, suspended payments under Section 902, except in hardship cases. This led to action by both Congress and the President. A clarifying bill (H. R. 2731, 78th Cong., 1st sess., see R. 1190, 1206) was introduced in Congress, and hearings were held. While the bill was being considered, on October 15, 1943, the President appointed the Advisory Board on Just Compensation, consisting of Circuit Judges Learned Hand, Hutcheson, and Parker, to devise rules and standards for measuring just compensation. Executive Order 9387, 3 C. F. R. 1943 Supp., p. 48. Thereupon the proposed legislation was dropped. 89 Cong. Rec. A4957-A4959.

The Advisory Board, after hearings, devised a set of rules which the War Shipping Administration adopted. Appendix B, *infra*, pp. 29-35. These rules contain a third approach to the problem, alternative to that taken by the Comptroller General and differing from that implied by the prior views of the War Shipping Administration; and it was these rules that this Court followed in *Cors*, 337 U.S. at 334. The Advisory Board agreed that ocean ship values reached a maximum in the middle of 1941, and thereafter declined somewhat. But it also found that the causes necessitating requi-

sition arose before May 27, 1941, and continued thereafter. It recognized that enhancement due to the causes necessitating the taking had not been eliminated, and established the three categories of prohibited enhancement which the Court adopted and amplified. See Rule 4, Appendix B, *infra*, pp. 32-33, and 337 U.S. at 330-331, 334-336.[20] The approach laid down by this Court and the Advisory Board was to find the value at the time of taking and deduct from it so much as was due to the enumerated causes. The Comptroller General's approach had been to find the 1939 value and adjust it for the increase in the general price level. Theoretically, as the Advisory Board recognized (see pp. 30-31, *infra*), the two methods could reach very similar results.[21]

Controversy continued even after the promulgation of the Advisory Board's rules, and was expanded to include disputes over the interpretation and application of those rules. Congress took

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[20] A second Advisory Board on Just Compensation was appointed in 1945 and reported on October 26, 1945. See fn. 4, *supra*, p. 7. The second board issued eight supplementary rules.

[21] It does seem very likely that the method of *Cors* and the Advisory Board should give results, for ocean vessels, close to those given by the Comptroller General's method of finding 1939 value and adding to it the increase due to general improvement in economic conditions. The difference between the total increase over 1939 values and the increase due to general economic conditions would probably measure the increase due to the Government's need. Since the Government's intervention did not become really large until mid-1940, and since values at that period were relatively near 1939 levels, the difference between the Comptroller General's method and the indicated method would probably not be great.

action which was intended, first, as confirming WSA's administration of the Board's rules and, later, as confirming the Comptroller General's more stringent views.[22] Even within the executive branch there was considerable dispute as to the application and meaning of the enhancement clause and the board's rules, especially in judicial determinations of just compensation.

b. In these circumstances, it seems plain, as Judge Clark said, that not until the *Cors* decision in June 1949, did the "enhancement" clause "have clear support and chance of operation within the Government or without" (R. 1701), and that the decision "marks a turning point and requires a new orientation in this case" (R. 1702).

It is true that in *Cors* the Court said that on the facts of that case the statutory standard was coterminous with the judicial standard. 337 U. S. at 332. The Government's interpretation of the clause had been attacked as an unconstitutional

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[22] Contrast the National War Agencies Appropriations Act, 1946 (Act of July 17, 1945), 59 Stat. 473, 480, and the Naval Appropriation Act, 1947 (Act of July 8, 1946), 60 Stat. 481, 499-500, 501, with the Second Supplemental Appropriation Act, 1948 (Act of July 31, 1947), 61 Stat. 695, 697-698. On the significance of these statutes, see the Government's brief in *Cors*, Oct. Term, 1948, No. 132, at pp. 103-105.

Congress has recently announced, once again, that it favors the Comptroller General's view of prohibited enhancement. The Third Supplemental Appropriation Act, 1951, P. L. No. 45, 82d Cong., 1st sess., June 2, 1951, provided that no money should be paid by the Department of Commerce for requisitioned vessels unless the price "is computed in accordance with subsection 902(a) [of the Merchant Marine] Act, as that subsection is interpreted by the General Accounting Office."

interference by Congress with the judicial function of measuring just compensation. The Court held it unnecessary to determine the issue, because the clause, as there applied, was merely an extension of the judicial principle that just compensation and market value are not always the same. The Court referred to *United States* v. *Miller,* 317 U. S. 369, excluding value due to the probability of condemnation, and to *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76, excluding value due to the taker's special need, as examples of this constitutional principle.

It does not follow, however, that because of this statement of the broad constitutional principle involved, the decision was old in its application to ships requisitioned in a war or emergency period. The Court clearly went beyond the particular example of *United States* v. *Miller, supra,* in defining the Government's need which necessitated the taking; the *Miller* rule is direct precedent for only one of the three aspects of the "causes necessitating the taking (*supra,* pp. 8-9). In the field of enhancement in ship values, the *Cors* opinion clearly changed "the legal atmosphere" and constituted a "modification or growth in legal principles" which effected "a significant change in the situation." Cf. *Commissioner* v. *Sunnen,* 333 U. S. 591, 600.

The courts below should have been responsive to that change. Their failure to respond means that an ocean-going cargo ship worth $450,000 in Sep-

tember 1939, has been priced at $983,250 in June 1942, without any real effort to ascertain how much of this doubling in value resulted from the Government's defense and war need which ultimately brought about the vessel's taking.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

APPENDIX A

The pertinent provisions of the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1242, are as follows:

SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such

amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damages to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

* * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any depart-

ment or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.

APPENDIX B

The letter of transmittal and the report of the first Advisory Board on Just Compensation to the War Shipping Administration read as follows:

ADVISORY BOARD ON JUST COMPENSATION,
WASHINGTON. D. C., DECEMBER 7, 1943

DEAR ADMIRAL LAND: We are herewith enclosing our report as the Advisory Board on Just Compensation. In it we have set forth in the form of rules the standards and principles to be observed, in respect of the valuation of vessels requisitioned for title or use by the United States, and in the disposition of matters which have arisen and will arise in connection with the granting of insurance upon and the voluntary chartering of vessels.

In arriving at the conclusions the rules embody we have been greatly aided by the material contained in Document 20, in the hearings before the Bland committee, and by the arguments and briefs filed at the public hearing held on November 26 and 27. Because of the

full and exhaustive character of these aids to our deliberations, our labors have been greatly lightened, the time required for them has been shortened, and our confidence in the correctness of the rules we have embodied in our report as our best judgment in the premises has been greatly enhanced.

It seems appropriate to comment briefly on the Comptroller General's ruling of November 28, 1942. Contrary to the impression existing in many quarters, the Comptroller General does not limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the determination of values. The necessity of allowing subsequent enhancement that is not directly caused by economic conditions resulting from the emergency is specifically recognized by him. This standard does not necessarily exclude subsequent enhancement which directly reflects the economic changes incident to the improvement in general conditions since 1939.

It is obviously impossible to know without very extensive inquiry into the facts to what extent any enhancement in value was due to that cause, and the order which created the Board confined its duties to the establishing of "standards, rules, and formulae." On this account we did not undertake to consider how far the rules we are submitting would in practice reach different results from the rules recommended by the Comptroller General. It is conceivable that in application the difference might turn out to be far less than has at times

been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

We have been greatly impressed not only with the care and consideration which the record discloses that both you and the Comptroller General have given to the matters involved, but with the moderation and judgment exercised by all concerned in endeavoring to work out a solution consistent with the interest of the United States and the justice of the case. In closing we take this opportunity to record our great appreciation of the fact that this has been so.

Respectfully,

(Signed) LEARNED HAND.
(Signed) JOHN J. PARKER.
(Signed) JOSEPH C. HUTCHESON, JR.

Admiral EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the order of the President of October 15, 1943, establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States", establishes "fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining

the just compensation to be paid for all vessels requisitioned, purchased, chartered, or insured by the Administration."

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest. Value means value on the American market, not on foreign markets.

Rule 2.—In the case of requisition of foreign-flag vessels under Public Law 101, just compensation should be determined as in the case of domestic vessels.

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acqusition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of tak-

ing, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

Rule 5.—The enhancement clause of section 902 (a) of the Merchant Marine Act of 1936, has no application to the valuation of chartered vessels for the purpose of insurance.

Rule 6.—The enhancement clause of section 902 (a) has no application to voluntary charters or purchases under Public Law 101.

Rule 7.—In the event of loss due to a risk assumed by the United States in connection with the use of any vessel where no valuation or

other mode of compensation has been agreed to, just compensation should be determined on the basis of value on the date of such loss. Where a redetermination or readjustment of rates or values is effected pursuant to the terms of a charter or other agreement, just compensation should be determined as of the date of redetermination. In both cases the determination is subject to deduction on account of enhancement, if any, as hereinabove set out in rule 4.

Rule 8.—Section 902 (b) of the Merchant Marine Act of 1936 has no application to vessels merely because they have received mail subsidies under the act of 1928. The section has application only to vessels which have received a construction-differential subsidy under title V of the Merchant Marine Act of 1936; and a mail subsidy is not a construction-differential subsidy within the meaning of section 902 (b) of the act.

Rule 9.—Valuations agreed upon by the Administrator and owners are binding, if not in excess of just compensation determined as above prescribed; and settlements should be made on the basis of such valuations with an allowance for any actual loss due to the delay in payment from the date when such settlements would have been made, if no objections had been raised, not exceeding the current commercial rate of interest.

Rule 10.—Agreements fixing compensation for the title or use of vessels are not binding in the valuation of vessels of owners not parties to the agreements. Such valuations, however, if freely arrived at, may be considered along with other factors as some evidence of value.

LEARNED HAND.
JOHN J. PARKER.
JOSEPH C. HUTCHESON, JR.

DECEMBER 7, 1943.

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CONTENTS.

PAGE

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 3

SUMMARY OF ARGUMENT 4

FIRST POINT—The rules of law approved by this Court in *United States* v. *Cors* were expressly applied by the courts below in making concurrent findings fully supported by the evidence that no "deductible enhancement" was included in the *Alaskan*'s valuation 4

1. The Rules of the Advisory Board on Just Compensation were expressly adopted by the Commissioner as the rules of law to be applied in determining Just Compensation for the *Alaskan* 5

2. The Commissioner's method of valuation followed precisely the Advisory Board's Rule 3 for determining value "where market value cannot be determined by sufficient sales * * * made at or about the time of taking" 6

3. The Commissioner's valuation was below the 1941 domestic market prices of less desirable vessels and was not "squarely based * * * on 1941 values" as petitioner asserts 8

4. The Commissioner's application of the "enhancement clause" favored the petitioner rather than the respondent 11

5. In *United States* v. *Cors*, this Court expressly confirmed the Advisory Board's Rules, including Rule 4 on deductible enhancement 14

PAGE

SECOND POINT—The Court of Appeals properly affirmed the District Judge's denial of petitioner's motion for a new trial to offer "additional proofs" on deductible "enhancement" 20

1. Denial of a motion for a new trial is reviewable only on a showing of a clear abuse of discretion 20

2. The denial of a new trial in this case was fully supported by the record and the *Cors* decision 21

3. Petitioner's proposed "additional proofs" in this case were, in any event, immaterial in view of this Court's decision in *United States* v. *Cors* 23

(a) The particular market rule in the *Cors* decision makes immaterial the proposed "additional proofs" relating to the activities of the government in the commodities, munitions and transportation markets 24

(b) No "enhancement" could have been caused even by the government's activities in the transportation market because there is no showing of any substantial government activity in that market prior to the passage of the Ship Warrants Act in July, 1941, under which the government could and did compel transportation of its goods at rates established by the government itself 26

4. The rise in domestic ship market prices during 1939/1941 is fully explained by causes unconnected with any needs and activities of our government in the market for ships or in the market for ocean transportation 28

5. Judge Clark's dissent was based on erroneous assumptions of fact and law 30

LAST POINT—The Petition for Writ of Certiorari should be denied 31

CITATIONS.

Decisions:

	PAGE
American Smelting & Refining Co. v. *Sutyak*, 175 F. (2d) 123	20
Astles v. *Quacker City Bus Co.*, 158 F. (2d) 979	21
Atkinson v. *Atkinson*, 132 F. (2d) 917	20
Atlantic Coast Line R. Co. v. *Smith*, 135 F. (2d) 40	21
Bateman v. *Donovan*, 131 F. (2d) 759	21
Campbell v. *American Foreign S. S. Co.*, 116 F. (2d) 926	20
Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474	20, 21
Faulkner v. *Gibbs*, 338 U. S. 267	4
Flint v. *Youngstown Sheet & Tube Co.*, 143 F. (2d) 923	21
General Pictures Co. v. *Western Electric Co.*, 304 U. S. 175	4
Holmgren v. *United States*, 217 U. S. 509	20
Indianapolis and St. Louis R. R. Co. v. *Horst*, 93 U. S. 291	20
Kerr v. *Clampitt*, 95 U. S. 188	20
Magnum Co. v. *Coty*, 262 U. S. 159	4
McIntyre v. *Texas Co.*, 48 F. (2d) 211	20
Miller v. *Maryland Casualty Co.*, 40 F. (2d) 463	21
Newcomb v. *Wood*, 97 U. S. 581	20
Searfoss v. *Lehigh Valley R. R. Co.*, 76 F. (2d) 762	21
United States v. *Bransen*, 142 F. (2d) 232	20
United States v. *Cors*, 337 U. S. 325, Cited throughout, but see particularly	2, 5, 14, 23
United States v. *Johnson*, 327 U. S. 106	20
United States v. *Johnston*, 268 U. S. 220	4
United States v. *Miller*, 317 U. S. 369	15
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	20

Statutes:

PAGE

Intercoastal Shipping Act, 1933, (47 Stat. 1425; 52 Stat. 964) 26

Merchant Marine Act, 1936, Section 902, 46 U. S. C. 1242 ..... 1, 2, 4, 15

Neutrality Act of November 4, 1939, 54 Stat. 4 28

Ship Warrants Act, 55 Stat. 591 ..... 10, 27

Transportation Act of 1940, (54 Stat. 952) 26

Miscellaneous:

Advisory Board on Just Compensation, Rules of,
Rule 3 7
Rule 4 ..... 5, 11, 14, 17, 18, 20

Executive Order 9387 5

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 487.

UNITED STATES OF AMERICA,
Petitioner,

against

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
as Owner of the SS. *Alaskan*,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The government's petition asks this Court to review *concurring decisions* of the United States Court of Appeals, Second Circuit, and the United States District Court for the Southern District of New York *upon a question of fact —the valuation of respondent's steamer Alaskan.*

The *Alaskan* was requisitioned by the United States on a time charter basis on June 12, 1942 and was sunk by an enemy torpedo on November 28, 1942, while insured by the United States under a policy of war risk insurance which obligated the United States to pay respondent, in case of a total loss of the vessel, "just compensation therefor * * * determined in accordance with Section 902 of the Merchant Marine Act, 1936, as amended." (R.* I, 16-20; R. III, 1141-1157.)

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* References in this brief preceded by "R." are to the printed transcript of record, the number of the volume of the transcript being indicated in roman numerals followed by the number of the page in arabic numerals.

Section 902(a) of the Merchant Marine Act, 1936, provides, in part, that when a vessel is requisitioned under the authority of the statute, "the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.*" (The wording which is sometimes called the "enhancement clause" has been italicized by us.)

The *Alaskan's* value for purposes of just compensation, both at the time of her requisition and at the time of her loss, was found to be $983,250* by the Commissioner, George W. Alger, Esq., (R. III, 1535-1570), whose report was confirmed by District Judge Leibell in an opinion and supplemental opinion, (R. III, 1580-1625; 85 F. Supp. 815), and affirmed, (one judge dissenting**), by the Court of Appeals, Second Circuit, on the opinions below. (R. III, 1697-1699; 191 F. (2d) 26.)

A second review of the Commissioner's report was made by Judge Leibell before the appeal was argued but after this Court had decided *United States* v. *Cors,* 1949, 337 U. S. 325, construing the so-called "enhancement clause" quoted above. The occasion for his second review was petitioner's motion for a new trial based upon assertions of petitioner's counsel that "additional proofs" were available relating to the application of the "enhancement clause," as construed in *United States* v. *Cors, supra,* to the Commissioner's valuation. (R. III, 1648-1656.) Judge

---

* The parties' valuations ranged from respondent's claim of at least $1,350,000 (R. III, 1538) to petitioner's various figures which were: $879,750 (the valuation offered in 1942 in petitioner's war risk insurance policy as an alternative to just compensation, R. III, 1536), $776,003 (offered as just compensation in 1944, R. III, 1538), and $716,000 or less contended for at the trial (R. III, 1539).

** Judge Clark's dissenting opinion is discussed at pages 14, 30 and 31 of this brief.

Leibell denied the motion for a new trial, setting forth his reasons in an extensive opinion which the Court of Appeals adopted in affirming Judge Leibell's denial of the motion. (R. III, 1657-1678, 1698-9, 1704.)

Questions Presented.

The petition does not present any question of law which has not been settled by this Court, nor any of the other grounds specified in Rule 38(5)(b) of this Court as reasons for exercise of its discretionary power to grant certiorari. On the contrary, the petition admits (p. 2), that the sole question presented is one of fact, namely, "whether * * * the court below improperly approved an award which * * * included enhancement due to the causes which necessitated the taking." That question of fact has thrice been decided against the petitioner in the concurring decisions of the Commissioner, the District Judge and the Court of Appeals, each applying the rules of law approved by this Court in *United States* v. *Cors, supra.*

The questions presented, therefore, are: (1) whether there was substantial evidence of record supporting the concurring findings of fact by the Commissioner, District Judge and Court of Appeals that no deductible "enhancement" was included in the Commissioner's valuation of the *Alaskan;* and (2) whether the Court of Appeals properly held that there was no abuse of discretion by the District Judge in denying petitioner's motion for a new trial to submit "additional proofs" which could have been submitted at the trial and which, even if true, would not, in the opinion of the District Judge, change the result of the original proceeding?

Summary of Argument.

A writ of certiorari merely to review the evidence in cases where no question of law is involved is not granted by this Court, especially when two lower courts have concurred in the findings of fact. *Magnum Co.* v. *Coty*, 1923, 262 U. S. 159, 163; *United States* v. *Johnston*, 1925, 268 U. S. 220, 227; *General Pictures Co.* v. *Western Electric Co.*, 1938, 304 U. S. 175, 178; *Faulkner* v. *Gibbs*, 1949, 338 U. S. 267. The foregoing rule is applicable in this case and the petition should be denied for the following reasons:

1. The rules of law approved by this Court in *United States* v. *Cors* were expressly applied by the courts below in making concurrent findings fully supported by the evidence that no "deductible enhancement" was included in the *Alaskan's* valuation.

2. The Court of Appeals properly affirmed the District Judge's denial of petitioner's motion for a new trial to offer "additional proofs" on the "deductible enhancement" issue.

FIRST POINT.

THE RULES OF LAW APPROVED BY THIS COURT IN *United States* v. *Cors* WERE EXPRESSLY APPLIED BY THE COURTS BELOW IN MAKING CONCURRENT FINDINGS FULLY SUPPORTED BY THE EVIDENCE THAT NO "DEDUCTIBLE ENHANCEMENT" WAS INCLUDED IN THE *Alaskan's* VALUATION.

The interpretation and application given by the courts below to the so-called "enhancement clause" of Section 902 of the Merchant Marine Act, 1936, and the full conformity of such interpretation and application with the

decision of this Court in *United States* v. *Cors*, 337 U. S. 325, readily appears from the opinions and the record.

1. THE RULES OF THE ADVISORY BOARD ON JUST COMPENSATION WERE EXPRESSLY ADOPTED BY THE COMMISSIONER AS THE RULES OF LAW TO BE APPLIED IN DETERMINING JUST COMPENSATION FOR THE *Alaskan*.

Before making findings of fact, the Commissioner quoted (R. III, 1540-1542), the pertinent Rules of the Advisory Board on Just Compensation*, including Rule 4 prescribing the application to be given to the "enhancement clause" in the following terms:

> "Rule 4. From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. *Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted.* In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the

* The Advisory Board consisted of Circuit Judges L. Hand, Parker and Hutcheson and was constituted by Executive Order 9387, dated October 15, 1943. Its report, dated December 7, 1943, is printed in 1943 A. M. C. 1317 and also in the petition (p. 29), as "Appendix B".

foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted." (Italics added.)

After quoting those Rules, the Commissioner stated, (R. III, 1542-3):

> "These rules embody established legal principles which should not only govern the action of the War Shipping Administration but should be here applied in the determination of the present issues.
>
> "We will now consider the facts concerning the *Alaskan* to which these principles are to be applied."

2. THE COMMISSIONER'S METHOD OF VALUATION FOLLOWED PRECISELY THE ADVISORY BOARD'S RULE 3 FOR DETERMINING VALUE "WHERE MARKET VALUE CANNOT BE DETERMINED BY SUFFICIENT SALES * * * MADE AT OR ABOUT THE TIME OF TAKING."

The Commissioner reviewed the evidence regarding respondent's 40-year history as a common carrier and the employment of its large fleet, including the *Alaskan*, prior to its requisitioning by the United States in 1942. (R. III, 1545-6.) He also set forth the construction cost of the *Alaskan*, respondent's acquisition cost (including cost of betterments), her design, equipment, classification, maintenance and good physical condition when requisitioned. (R. III, 1543-1945.) He expressly found her to be capable of substantially as good performance as comparable C-2 vessels built by the government during World War II and of better performance than a "Liberty" vessel. (R. III, 1544-5, 1558.)

Next the Commissioner found (R. III, 1546-7):

> "*There was no sales in 1942 on which the value of the Alaskan could be properly based,* a matter which will be considered later. *Resort has accordingly been made to a wide range of other factual matters* bearing upon that issue, *including potential*

as well as actual earnings of the vessel in prior years as well as the year in which it was sunk, its potential earning power being compared with the vessels currently built by the Government during the war, purporting to indicate that in this respect the *Alaskan* was equivalent to a C-2 and substantially better than a Liberty ship. *The record also includes expert testimony on the cost of replacement of the vessel with allowances for depreciation for its years and testimony of experts, as to value based on earning capacity.* The record also shows the general rates of earning of dry cargo vessels *and the sales of such vessels in years immediately preceding 1942,* which afford a sort of barometer of the shipping industry during those years, particularly showing the trend in prices per deadweight ton of cargo vessels sold." (Italics added.)

After specifically considering the foregoing and the other evidence relating to value, the Commissioner said (R. III, 1562-3):

> *"In reaching a conclusion as to what price would result from negotiations between an owner willing to sell and a purchaser willing to buy* the *Alaskan* in 1942 when it was requisitioned and sunk, *I have taken into consideration all relevant evidence and sought to reach a conclusion which is a reasonable judgment based thereon.* • • • Giving due weight to all the proof submitted before me my conclusion is that the value of the *Alaskan* should be fixed at $95.00 per deadweight ton, or the sum of $983,250." (Italics added.)

The Commissioner's method of valuation was precisely the method prescribed by the Advisory Board's Rule 3, which reads:

> "Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is

to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy."

3. THE COMMISSIONER'S VALUATION WAS BELOW THE 1941 DOMESTIC MARKET PRICES OF LESS DESIRABLE VESSELS AND WAS NOT "SQUARELY BASED * * * ON 1941 VALUES" AS PETITIONER ASSERTS.

Petitioner's thesis is found in its assertion, (p. 15) that "the Commissioner squarely based his award on 1941 values which, as we have just shown, were necessarily inflated by the government's shipping activities."

The implication is that the Commissioner valued the *Alaskan* at 1941 market prices which the petitioner contends and respondent denies, were "enhanced" by government activity.

In fact, however, the very passages of the Commissioner's report cited by petitioner show that the Commissioner considered 1941 market sales prices, (adjusted for the *Alaskan's* advantage over the vessels actually sold), as a mere starting point and only one factor of many on which he based his valuation, for he expressly states that he gave effect to government restrictions in 1941 and 1942 and "all the other factors relating to value." (R. III, 1563.) These covered a "wide range of other factual matters," including "expert testimony on the cost of replacement of the vessel with allowances for depreciation for its years and

testimony of experts as to value based on earning capacity." (R. III, 1546-7.) (Italics added.)

Actually, the Commissioner's valuation of the *Alaskan* as of June and November, 1942 at only $95 per deadweight ton, was considerably below 1941 market value, as he had found that at the peak of the 1941 domestic market in April, 1941, a group of four vessels were sold at an average price of $99.66 per ton and that "none of them compared with the *Alaskan*" in classification status and other particulars. (R. III, 1555.)

The testimony of experts based on earning capacity showed that the *Alaskan* had a value of $130 to $150 per deadweight ton. (R. I, 277-282, 542.) The earnings on which those opinions were based did not "obviously reflect the Government's intervention in the free market," as the petition erroneously asserts. (p. 15.) They included a statement of the earnings* of *all* voyages of respondent's vessels in foreign trade during 1941 and 1942, (R. I, 315-325), *except that voyages made under charters to the United States government were omitted* because the rates in such charters were arbitrarily fixed by the government and were admittedly below market rates. (R. II, 1043, 1097, 1102, 1115.) The financial exhibits showed that the *Alaskan's* earning power *in non-governmental business* was at the rate of $68.40 per deadweight ton or a total of $717,940 per year, before depreciation and taxes. (R. I, 328-331, 424-5; Ex. 30.) Thus the *Alaskan's* earning power *per annum* was 72% of her total value as found by the Commissioner and 159% of the $450,000 which petitioner says was her market value on September 8, 1939.

There was not a shred of evidence that the earnings figures were in any way enhanced by any activities of the

* Government accountants verified the earnings shown in the statement. (R. II, 1014.)

United States government to satisfy its needs either in the particular market for the purchase and sale of vessels or in the market for ocean transportation. On the contrary, these earnings were well within the range of profits of $4 to $6 per deadweight ton per month which were admittedly being realized from charters to commercial operators in 1941, (R. III, 1202) and the record contained the following express admission by Admiral Land, Chairman of the Maritime Commission: "It is true that 1941 was a prosperous year for most steamship companies. This prosperity was not based on monies received from the United States Government, for we were then at peace, and had not requisitioned the merchant fleet, but rather on the great improvement in the steamship business in that year which was worldwide in scope." (R. III, 1225, 1548.)

Earlier in the same statement, Admiral Land had referred to 1941 as "the peak year * * * when vessel owners earned well in excess of $4 per deadweight ton on old freighters and tankers. * * * *In 1941, the values of freighters and tankers had risen to about between $100 and $150* per ton." (R. III, 1224.) (Italics added.)

The only reason given by the Commissioner for so drastically reducing the valuations of respondent's experts was "the effect of the increased restrictions during the Second World War, the Ship Warrants Act* being the principal item in these controls." (R. III, 1557.)

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* The Ship Warrants Act was enacted on July 14, 1941. (50 War Appendix, U. S. C. Sec. 1281.) Respondent contends that the so-called Warrant Act "controls" should be disregarded in determining just compensation because: (1) the Maritime Commission exceeded its powers by requiring observance of unreasonably low charter rates as a condition of obtaining warrants, such rates having been fixed without due process of law and for the admitted purpose of later taking vessels at rates thus arbitrarily depressed; and (2) notwithstanding such "controls", the *Alaskan's* earning power was not in fact reduced.

Thus it is clear that, contrary to the petitioner's assertion, the Commissioner's valuation was below a fair valuation based on 1941 market sales prices and far below her value based on her earning power unenhanced by government activity. His reduced valuation was solely based on his view that government measures taken under the guise of administering the Ship Warrants Act had *depressed* rather than *enhanced* the value of the *Alaskan* in 1942.

Amazingly, in addition to claiming a deduction for alleged "enhancement," petitioner claimed in the courts below and continues to claim in the petition, (footnote, p. 2) that the Commissioner should have attributed an even greater depressing effect than he did, to these activities under the Ship Warrants Act. Thus, petitioner is claiming that the Commissioner should have attributed *both* an enhancing and a depressing effect to petitioner's activities. How the Commissioner could have performed such a feat of self-contradiction is left wholly unexplained in the petition.

4. THE COMMISSIONER'S APPLICATION OF THE "ENHANCEMENT CLAUSE" FAVORED THE PETITIONER RATHER THAN THE RESPONDENT.

Petitioner admits that it "mainly relies" on a claim of enhancement in 1941 market prices "due to the Government's need of vessels which has necessitated the taking." (Petition, pp. 9, 12-15).

No claim has been asserted by the petitioner in the courts below or in the petition of the existence of either of the other two types of deductible enhancement recognized in the Advisory Board's Rule 4, namely enhancement due "to the previous taking of vessels of similar type or to a prospective taking." On the contrary, petitioner admits that there were no takings prior to July, 1941, which was

after the peak of the domestic ship sales market had been reached in April, 1941 (Petition, p. 10), and that petitioners activities under the Ship Warrants Act of July 14, 1941 caused a *decrease* in market values (Petition, p. 14).

(a) So far as 1941 market values are concerned, we have already shown elsewhere* that such values, whether based on market sales or on earnings, were not enhanced by any need of our government for vessels of the *Alaskan's* type, because those values were admittedly based on commercial operations and earnings and because the Advisory Board's Rule 4 specifically provided that "enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted."

We have also shown that, despite the latter provision of Rule 4, the Commissioner's valuation was below the unenhanced 1941 market values and far below the values established by expert testimony on the basis of 1941 earnings for non-governmental business.

Thus it is the respondent, rather than the petitioner, which has ground for complaint concerning the Commissioner's action in respect of 1941 values measured either by market sales or earning power.

(b) The Comptroller General's interpretation** of the enhancement clause as prohibiting "the payment of compensation * * * to the extent that it may be based upon values in excess of the values existing on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the National Emergency," was specifically urged upon the Commissioner in the brief of petitioner's trial counsel and is again urged in this Court as correct and as approved by Congress. (Petition, pp.

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* See pp. 8-11, 21-22, 26-30 of this brief.

** 22 Comp. Gen. 497, 608.

20-23.) Petitioner's counsel put in evidence a price index of shipbuilding costs from 1939 onward which the Comptroller General suggests as a measure of permissible enhancement above September 8, 1939 values (R. II, 966-980; Ex. HH.), but there was absolutely no evidence showing any relationship whatever between the changes in the index of costs of building new ships and the current market values of existing ships like the *Alaskan.*

The Commissioner and Judge Leibell were fully justified in rejecting (R. III, 1588-9), the Comptroller General's interpretation not only on the facts, but also because that interpretation was untenable as a matter of law and, indeed, was rejected by this Court in *United States* v. *Cors.* (See pp. 19-20 of this Brief.)

(c) The Commissioner expressly invoked the "enhancement clause" as a ground for disregarding respondent's evidence of ship sales made from and to the government in 1942 at prices far above the Commissioner's valuation of the *Alaskan* at $95 per ton (R. III, 1558-9).

Undisputed evidence showed that the government itself was engaged both in buying and selling vessels in 1942 after its general requisitioning of privately-owned vessels had made the private domestic market virtually non-existent. Newly constructed freighters comparable to the *Alaskan,* (R. III, 1558), were sold by the government to unsubsidized private buyers for $294 per deadweight ton, (R. III, 1118.), and the government itself was contracting for mass-produced Liberty-type vessels inferior to the *Alaskan,* (R. III, 1554-5), at $160 per deadweight ton. Exhibits 6 and E. Certainly no element of "deductible enhancement" could have been present in the prices charged by the government itself.

In addition, the government purchased in 1942 about 315,000 tons of old laid-up vessels from 20 to 40 years old

at an average cost of approximately $130 per deadweight ton (R. III, 1505).

The Commissioner not only found the foregoing sales to be too meager in number to make a market, (R. III, 1549), but he also stated that the enhancement clause of Section 902 was "an additional reason" why such 1942 indicia of value should not be considered.* (R. III, 1562.)

5. In *United States* v. *Cors*, this Court expressly confirmed the Advisory Board's Rules, including Rule 4 on deductible enhancement.

In *United States* v. *Cors*, 337 U. S. 325, this Court reviewed an award of just compensation by the Court of Claims for the government's taking of ownership of the tug *MacArthur* at New York on October 15, 1942. The amount awarded by the Court of Claims was *the tug's full actual market value on the date of taking*, notwithstanding that court's further express finding that market values had risen from two causes: (1) "demand for vessels which followed the outbreak of war in Europe" and "the great increase in shipping and harbor traffic during the period of the war"; and (2) "After May 27, 1941, and particularly after December 7, 1941 * * * the Government's need for vessels, which necessitated the taking of many vessels." (110 Ct. Cls. 66, 77; 337 U. S. 325, at 329, 335.)

This Court, in a 5 to 4 decision, reversed and remanded the case to the Court of Claims stating, page 335: "The findings as to the rising market for tugs in and about the Port of New York tell us that some of the enhancement is

* Judge Clark's statement in his dissenting opinion that the Commissioner used the enhancement clause "to support an increase in value over the 1942 lower point" (R. III, 1701), seems to have been based on some misapprehension of the facts of record.

due to the government's need. But we are left in the dark as to how much it may be."*

In arriving at its conclusion, the majority of the Court found it unnecessary to decide whether the "just compensation" provided for by Section 902 of the Merchant Marine Act, 1936, and limited by the "enhancement clause" was unconstitutional as transgressing the "judicial standard" of just compensation because, they said, "we are satisfied that on the present facts the two are coterminous" (337 U. S. 325, 331-2).

Continuing, the majority pointed out that *market value* as a *prima facie* measure of just compensation was subject to exceptions established in prior decisions, including *United States* v. *Miller*, 1943, 317 U. S. 369, which had excluded from just compensation speculative increases in market value arising from the probable taking and special values available only to the requisitioning authority. After discussing such exceptions, this Court said (p. 332):

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* On remand of the *Cors* case, the government was unable to show any deductible enhancement whatever and the Court of Claims rendered a further decision on April 3, 1951 (119 Ct. Cls. 296), again awarding full market value at the time of taking as just compensation. No further review of that decision was sought by the government. Regarding the evidence on "deductible enhancement," the Court's finding No. 9 was:

> "The evidence as to the amount of deductible enhancement contains many doubtful elements; it omits consideration of material facts; it is based in part on assumptions that are not supported by any evidence, and is so conjectural and speculative that it is impossible to determine the amount by which the market value of plaintiff's vessel was enhanced as a result of the causes necessitating the taking, or to estimate the amount of such enhancement with reasonable accuracy. A careful study of the evidence, however, reflects that during the entire period with which this action is concerned, the enhancement in the market value of the vessel as a result of the Government's need for vessels which necessitated the taking, or as a result of the previous taking of vessels of a similar type, was negligible."

> *"We believe, however, that these exceptions are merely illustrations of a principle which excludes enhancement of value resulting from the government's special or extraordinary demand for the property."* (Italics added.)

Thus, *this Court expressly refrained from making any change in the established judicial standards of just compensation.* The Court merely combined into a single exception certain pre-existing, and theretofore separately stated, exceptions to the market value standard.

The majority of the Court then stated that the enhancement to be deducted is such portion of the *market price* as merely represents "what can be exacted from the Government whose demands in the emergency have created a seller's market" and reflects "speculation as to what the Government can be compelled to pay" rather than "what 'a willing buyer would pay in cash to a willing seller,' * * * in a fair market" (337 U. S. 333-4).

The process whereby such *market price* inflation occurs was described by the Court as follows (337 U. S. 333):

> "* * * In time of war or other national emergency the demand of the government for an article or commodity often causes the *market* to be an unfair indication of value. The special needs of the government create a demand that outruns the supply. *The market,* sensitive to the bullish pressure, *responds with a spiraling of prices. The normal market price* for the commodity *becomes inflated.* And so the *market value of the commodity is enhanced* by the special need which the government has for it." (Italics added.)

The reason for the enhancement exception was stated by the majority as follows, page 333:

> "It is not fair that the government be required to pay the enhanced price which its demand alone has created."

This Court considered the Rules of the Advisory Board on Just Compensation, quoting in full Rule 4 on deductible "enhancement" (pp. 330-1), and expressly approved the Rules in the following passage of the majority opinion, page 334:

> *"What we have said is in accord with our reading of the Report of the Advisory Board.* Any enhancement of value must be deducted where it is due (a) 'to the government's need of vessels which has necessitated the taking,' (b) 'to the previous taking of the vessels of similar type,' or (c) 'to a prospective taking, reasonably probable * * *.'
>
> "The government's need of vessels which has necessitated the taking is its need for the precise ship taken, for the type of class of ship taken, or for ships which perform the same or related functions. The government's need for cargo vessels may affect indirectly the price level of many commodities. It may, for example, affect the price of rowboats. But if the government takes a rowboat, *the enhancement to be excluded is that which results from the government's activities in the particular market.* It is the government's demand in that market that is the measure of the 'causes necessitating the taking or use' in this situation." (Italics added.)

Respondent submits that a fair generalized statement of the majority's holding on the "enhancement" exception in *United States* v. *Cors* is this: In cases where the full actual current market price of property at the time of taking is claimed as just compensation for the taking and where such actual market price is shown to exceed the fair market price because of a speculative or inflationary increase caused

by activities of the government in the particular market for the property to satisfy the government's special need either for the actual property taken or for the same type of property or property performing the same or related functions, then, in such cases, the amount of such excess or enhancement above the fair and reasonable market price is deductible from the full actual market price because it represents an element of value created solely by the government which is not, therefore, justly recoverable from the government.

The foregoing analysis demonstrates the following points regarding the bearing of *United States* v. *Cors* on the *Alaskan* case:

(a) The Commissioner governed himself by a rule of law expressly approved by this Court, when he adopted the Advisory Board's Rule 4 on the interpretations of the "enhancement clause."

(b) There is no foundation for petitioner's assertions (below, R. III, 1650-1), that the *Cors* decision "fundamentally modified" the controlling law on which this case was tried and (in the petition, pp. 23-24), that "the *Cors* opinion clearly changed 'the legal atmosphere'."

(c) The *Cors* decision has no application to the Commissioner's *Alaskan* valuation because: (i) his valuation was not measured by actual market value in 1942 at the time of her taking or at the time of her loss but was a "reasonable judgment" based on many other factors, whereas the *Cors* decision only authorizes deductions for "enhancement" as therein defined where actual current market value is adopted as the measure of just compensation; and, (ii), to the extent that the Commissioner may have considered 1941 vessel market prices as one factor in arriving at his valuation, we have also shown that such

1941 market prices were not increased by any activities of our government in that market to satisfy its needs, but were based on "a general rise in prices or earnings."

(d) The Comptroller General's interpretation of the "enhancement clause" was expressly considered by this Court (pp. 330-1), and was necessarily overruled by the *Cors* decision because this Court only required deduction of such part of the enhancement in the *MacArthur's* market value as was due to "the effect of the government's activities in the particular market" (p. 335). The Court left undisturbed the enhancement due "to the great increase in shipping and harbor traffic because of the war" (pp. 329, 331).

The latter enhancement would apparently be excludable under the Comptroller General's view which would eliminate any values in excess of those prevailing on September 8, 1939, provided such excess be determined as due to *"economic conditions directly caused by the national emergency."*

The Comptroller General's view does not differentiate between "economic conditions" caused by the government's needs and activities in the particular market for the property taken and other "economic conditions" springing from a "national emergency" but having no causal connection with such needs and activities. Nor does he distinguish between increases in value due to a general rise in prices or earnings and speculative, "hold-up" increases created solely by the government's demand for the property. Only the latter type of increases is deductible according to the *Cors* decision.

Moreover, the Comptroller General's interpretation tends to "freeze" ship values as of September 8, 1939, merely because the President had then declared a "limited

national emergency," whereas Rule 4 of the Advisory Board, approved by this Court in the *Cors* decision, expressly states: "neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance."

SECOND POINT.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT JUDGE'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL TO OFFER "ADDITIONAL PROOFS" ON DEDUCTIBLE "ENHANCEMENT."

The petition is but a third attempt by petitioner for a new trial to permit petitioner to present additional evidence.

1. DENIAL OF A MOTION FOR A NEW TRIAL IS REVIEWABLE ONLY ON A SHOWING OF A CLEAR ABUSE OF DISCRETION.

This Court and other federal courts have repeatedly held that denials of such applications will not be reviewed except for clear abuse of discretion. The following are a few of the many decisions to that effect: *United States* v. *Johnson*, 1946, 327 U. S. 106, 111; *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 247; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 1933, 287 U. S. 474, 481; *Holmgren* v. *United States*, 1910, 217 U. S. 509, 521; *Newcomb* v. *Wood*, 1878, 97 U. S. 581, 583; *Kerr* v. *Clampitt*, 1877, 95 U. S. 188, 189; *Indianapolis and St. Louis R. R. Co.* v. *Horst*, 1876, 93 U. S. 291, 301; *Campbell* v. *American Foreign S. S. Co.*, 1941, C. C. A. 2, 116 F. (2d) 926, 928; *McIntyre* v. *Texas Co.*, 1931, C. C. A. 2, 48 F. (2d) 211; *United States* v. *Bransen*, 1944, C. C. A. 9, 142 F. (2d) 232, 235; *American Smelting & Refining Co.* v. *Sutyak*, 1949, C. C. A. 10, 175 F. (2d) 123, 128; *Atkinson* v. *Atkinson*, 1943, C. C. A. 5, 132 F. (2d)

917, 919; *Bateman* v. *Donovan*, 1943, C. C. A. 9, 131 F. (2d) 759, 764; *Atlantic Coast Line R. Co.* v. *Smith*, 1943, C. C. A. 5, 135 F. (2d) 40, 41.

Indeed, as the petitioner's motion for a new trial was really founded on a bare claim of excessive damages in a case where there was no error in respect of the applicable law, the further rule applies that denials of such motions are not reviewable at all. *Fairmount Glass Works* v. *Coal Co.*, 1933, 287 U. S. 474, 481; *Astles* v. *Quaker City Bus Co.*, 1947, C. C. A. 2, 158 F. (2d) 979; 980; *Miller* v. *Maryland Casualty Co.*, 1930, C. C. A. 2, 40 F. (2d) 463; *Searfoss* v. *Lehigh Valley R. R. Co.*, 1935, C. C. A. 2, 76 F. (2d) 762, 763; *Flint* v. *Youngstown Sheet & Tube Co.*, 1944, C. C. A. 2, 143 F. (2d) 923, 924.

2. THE DENIAL OF A NEW TRIAL IN THIS CASE WAS FULLY SUPPORTED BY THE RECORD AND THE *Cors* DECISION.

Any suggestion that it was an abuse of discretion by the District Judge to deny petitioner's motion for a new trial is precluded by the well-reasoned findings and opinion of Judge Leibell (R. III, 1657-1678), and the adoption of his opinion by the majority of the Court of Appeals (R. 1698-9).

Much of the evidence of record which supported the findings and conclusions of the Commissioner was reviewed in Judge Leibell's opinion of March 20, 1950, (R. III, pp. 1666-1675), and it is unnecessary to repeat it. Concluding his review, Judge Leibell found that there was "record evidence on the question of 'enhancement'—sufficient to find that no deductible 'enhancement,' * * * existed prior to May of 1941. The sale prices of vessels in 1941, upon which the Commissioner relied in determining a market value for vessels of the *Alaskan* type in 1941 were sales in December 1940 and April of 1941 (prior to May 1941) and the record

in this case shows that a 'deductible enhancement' based on any government need did not exist prior to that date."

After May, 1941 no "prohibited enhancement" is claimed to have occurred. On the contrary, the petitioner's contention is that its "controls" actually depressed the market values which ships had reached in the first half of 1941.

Judge Leibell characterized the petitioner's proposed "additional proofs" in the following passages (R. III, 1675-6):

> "The evidence which the government would now offer may be classified as follows: matters that were subject to judicial notice at the time of trial; matters already in the record in some other form; additional matter which would show the extent of the government's activities in the market from September 1939 on, as a shipper or berth or space charterer. This additional matter is of doubtful relevancy and would have no probative value on the issue, because it is not precise and limited to the kind of market in which the Alaskan would have to be valued to determine just compensation for her taking. Some of the additional evidence which the government would offer consists of records of sales by the government of surplus or laid-up vessels, and political and legislative matter, which would tend to decrease, not increase, ship values.
>
> "In *United States* v. *Cors*, 337 U. S. 325, 334, the Court held:
>
> > 'The government's need of vessels which has necessitated the taking is its need for the precise ship taken, or for ships which perform the same or related functions. The government's need for cargo vessels may affect indirectly the price level of many commodities. It may for example, affect the price of rowboats. But if the government takes a rowboat, the enhancement to be excluded is that which results

from the government's activities in the particular market. It is the government's demand in that market that is the measure of the "causes necessitating the taking or use" in this situation.'

"Assuming that a basis for reopening this proceeding were established, this additional evidence would not, in my opinion, change the result of the original proceeding. In such circumstances the Court's discretion should be exercised against granting the application. *Marshall's U. S. Auto Supply* v. *Cashman,* 111 F. (2d) 140 (C. C. A. 10th, 1940); *Moore's Federal Practice* (1948 Supp.), §59.02, n. 14.

"Further, this additional evidence, now sought to be presented, was available to the government at the time of the hearing in this action. The government's trial counsel was able and experienced. He turned in a highly creditable brief in support of the exceptions he filed to the Commissioner's report. It seems to me that the government's appeal counsel believed that its trial counsel would have achieved better results if he had made some of the contentions and offered the additional evidence which they now proffer. But that is no reason for granting an application of this kind. The government has had its day in the trial court and as a litigant is entitled to no more. See *Merchants Banking Co.* v. *Cargo of the Afton,* 134 Fed. 727, at p. 731; and *Toledo Scale Co.* v. *Comparison Scale Co.,* 261 U. S. 399, at p. 424."

3. PETITIONER'S PROPOSED "ADDITIONAL PROOFS" IN THIS CASE WERE, IN ANY EVENT, IMMATERIAL IN VIEW OF THIS COURT'S DECISION IN *United States* v. *Cors.*

The soundness of Judge Leibell's conclusion that the so-called "additional proofs" lacked merit is readily shown by testing those "proofs" at their face value against the holdings of this Court in *United States* v. *Cors, supra.* In doing so, we lay aside momentarily, for the sake of

argument, the two further conclusive objections to those "proofs"—i.e., that, as we have shown, they are contrary to the record and actual fact and that, in any case, they concern only 1941 ship market prices, whereas the *Alaskan* was valued as of 1942 at a lower amount.

The petitioner's alleged "additional proofs" boil down to two claims of fact: (1) the *use* of privately-owned American flag cargo ships at unspecified times between September 1, 1939 and December 31, 1941 to transport unspecified quantities of materials for building and supplying foreign bases, of "strategic and critical" materials imported for government stockpiling or as a result of "defense contracts" and for "lend lease" exports (Petition, p. 12); and (2) a rise in ship market prices which, petitioner says, "*must* have been directly due to the Government's *use* of ocean shipping" (Petition, p. 14). (Italics added.)

(a) *The particular market rule in the Cors decision makes immaterial the proposed "additional proofs" relating to the activities of the government in the commodities, munitions and transportation markets.*

In the *Cors* decision, (337 U. S. 325, at 344), this Court said: " • • • the enhancement to be excluded is that which results from the government's activities in the particular market." In this case, the petitioner has asserted "deductible enhancement" in the 1941 domestic market prices for freighters, but none of its proposed "additional proofs" concern activities in that market. Accordingly they would be of "doubtful relevance" and of "no probative value," as Judge Leibell held (R. III, 1675).

The alleged use of freighters referred to in the petition appears to have been: (1) an indirect result of petitioner's activities in the commodity markets for "strategic and

critical materials" imported for government account or in the munitions market for "strategic and critical materials" imported by private business to fill "defense contracts"; or (2) direct activities of petitioner in the ocean transportation market to obtain carriage of materials to build and supply our newly acquired foreign military bases or of lend-lease exports.

Only government activities in the market for the purchase and sale of freighters themselves would be pertinent here. That is a market whose transactions are between owners of existing ships or builders of new ships on the selling side and carriers of goods desirous of buying additional vessels. There is no claim or basis for suggesting that carriers were compelled to buy freighters or paid market prices exceeding those justified by the commercial earning power of the vessels bought or that the market was not a fair market in any other respect. The petition merely says that there was a "spiraling of prices" (p. 13). The word "spiraling", however, is no substitute for lack of evidence that the market prices contained any speculative or "hold-up" element attributable to the needs and activities of our government in the particular market.

Of the three markets in which government activity is claimed to have occurred, the one closest to the ship sales market was the ocean transportation market. But that market is necessarily different from the ship sales market because it is composed of the carriers on one side and the shippers of goods on the other side, and the subject matter is transportation service by ships instead of ships themselves.

Our government's alleged activities in the transportation market were all in our foreign trades, which are part of an international market comprised of a vast multiplicity of transactions between carriers and shippers of many

nationalities who contract for transportation of goods between seaports throughout the world. The soundness of the "particular market" rule excluding evidence of activities of our government in that market is apparent. It would be a manifest absurdity to try to ascertain in a judicial proceeding how prices in that market were affected, if at all, by our government's relatively insignificant activities and to what extent any consequent "enhancement" in transportation prices indirectly enhanced prices in our domestic ship market. The absurdity would be increased by the fact that up to July, 1941, most of our privately-owned freighters were employed in our domestic trades at rates regulated under the Transportation Act of 1940, (54 Stat. 952) or under the Intercoastal Shipping Act of 1933, (47 Stat. 1425; 52 Stat. 964). A rise in domestic market prices of ships stemming from increased earning power in the regulated domestic trades obviously contained no element of "deductible enhancement".

(b) *No "enhancement" could have been caused even by the government's activities in the transportation market because there is no showing of any substantial government activity in that market prior to the passsage of the Ship Warrants Act in July, 1941, under which the government could and did compel transportation of its goods at rates established by the government itself.*

The petition carefully omits to specify the number of privately-owned freighters chartered or the quantity of government traffic claimed to have moved by sea *before* the Ship Warrants Act was passed in July, 1941. Nor does the petition purport to state how the government traffic prior to the Warrants Act compared, in volume, with the total volume of our foreign and domestic traffic or that the government was charged at any time for carriage of

its goods more than the carriers could have obtained for other available traffic.*

After the passage of the Ship Warrants Act on July 14, 1941, proof of government activities in the transportation market would be wholly immaterial in this case because that Act enabled the government to enforce priorities in the carriage of its goods and defense materials at a "fair and reasonable maximum rate of charter hire or equivalent" as provided in Section 2 of the Act (P. L. 173, 77th Congress). The petition admits (p. 14), that the Maritime Commission did, in fact, impose ceilings forcing down charter rates and thereby caused a "decrease in theoretical market value" (p. 14).

Thus, even if any of the needs and activities of the government in the transportation market were pertinent in this case, the petitioner's own claims of fact do not warrant any assumption of "enhancement" in that market as a result of such activities. On the contrary, petitioner admits that during the second half of 1941 the government obtained transportation at less than the going commercial rates, and the record shows that it was not until the latter half of 1941 that the government's need for transportation grew to major proportions. (See Judge Leibell's quotations from government reports, R. III, 1670-1.)

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* In another case, (Smith-Douglass Co. *v.* United States, Court of Claims Docket No. 46289), the government has offered evidence that our total export and import dry cargo, (freighter), traffic was about 49,200,000 tons in 1939, 51,000,000 tons in 1940, and 49,800,000 tons in 1941.

In the same case, the total volume of actual government traffic claimed prior to July, 1941 was: (1) approximately 440,000 tons of Army and Navy traffic in 1940 and approximately 1,094,000 tons in the first half of 1941; (2) stockpiling imports of 130,295 tons in 1940 and 544,000 tons in the first half of 1941; and, (3) lend lease exports of about 124,000 tons in the first half of 1941.

Our total domestic dry cargo traffic in intercoastal, non-contiguous and coastwise trades amounted to about 41,700,000 tons in 1939. Comparable dry cargo figures for 1940 and 1941 have not been published, but the total volume of all domestic traffic, including tanker traffic, was greater in 1940 and 1941 than in 1939.

No claim of unfair gain to carriers at government expense can possibly arise when the government only pays for most of its transportation at lesser rates and never at greater rates than those paid by other shippers of goods.

That being so, it would be absurd to suggest that the market prices of ships themselves were "enhanced" because some unspecified portion of the earnings of some unspecified ships may have been derived from carriage of government traffic in 1939-1941.

4. THE RISE IN DOMESTIC SHIP MARKET PRICES DURING 1939/1941 IS FULLY EXPLAINED BY CAUSES UNCONNECTED WITH ANY NEEDS AND ACTIVITIES OF OUR GOVERNMENT IN THE MARKET FOR SHIPS OR IN THE MARKET FOR OCEAN TRANSPORTATION.

Causes accounting fully for the rise in the domestic market prices of privately-owned American flag and other neutral freighters from the outbreak of war in Europe in September, 1939 through June, 1941 appear in the record. Moreover, such causes were wholly independent of any needs of the government of the United States either for freighters themselves or for ocean transportation by freighters.

During that period the world oversupply of freighters existing in 1939 (R. III, 1196), shrank to the point where the effective supply was insufficient to meet the demands of the world's traffic (R. I, 525-7; R. II, 587, 887; R. III, 1187). By mid-1940, maritime nations having more than half the world's freighters were belligerents. Their freighter fleets were sustaining heavy losses by sinkings, (R. III, 1180) and were being withdrawn from neutral trades, thereby reducing the competition in such trades (Ex. 40, p. 211; R. III, 1197, 1241). The neutral trades, however, were the very ones to which the Neutrality Act

of November 4, 1939 (54 Stat. 4), had diverted our entire freighter fleet engaged in foreign commerce.

During that period also our own domestic supply of freighters was diminished by sales of some 167 privately-owned freighters to alien buyers with approval of the Maritime Commission and by the Commission's own sale to aliens of 47 freighters from its laid-up fleet. (R. III, 1241; also Annual Reports of the Maritime Commission to Congress).

While the supply of ships was thus decreasing, our export and import traffic was increasing both in tonnage and in value, (R. III, 1182) and the earnings of American flag carriers were likewise increasing sharply both in our domestic and foreign trades (R. III, 1231-2; Ex. 40, pp. 422, 426, 428).

Carriage of munitions of war or traffic to and from the combat zones was not a source of any of the earnings of American flag freighters because the Neutrality Act of November 4, 1949, (54 Stat. 4) had excluded our vessels from such zones.

The precipitous rise in foreign market prices of freighters illustrates the worldwide situation in merchant shipping caused by the factors mentioned above. According to a government price chart, foreign prices for 20-year old vessels rose from about $20 per deadweight ton in 1939 to about $155 at the end of 1941 and further to $176 in mid-1942 (Ex. 40, p. 389). Ten specific 1941 foreign sales were also in evidence, averaging $144 per ton, the peak being nearly $200 in September, 1941 (R. III, 1186, 1497-8). Sales in December, 1941 in the Argentine market were mentioned at $453 per deadweight ton (R. I, 525). This rise in foreign ship markets could hardly have had any connection with the relatively insignificant demands of our government for ocean transportation in our own export and import trade.

None of the foregoing facts is even mentioned or suggested in the petition. Yet those conditions were operative long before our government's activities in the market for ocean transportation had attained any significance and they fully justified the finding of the District Judge that there was "record evidence on the question of enhancement—sufficient to find that no deductible 'enhancement' * * * existed prior to May, 1941" (R. III, 1674). None could have occurred after that date because the peak of the domestic ship market had occurred in April, 1941. See p. 9 of this brief.

5. JUDGE CLARK'S DISSENT WAS BASED ON ERRONEOUS ASSUMPTIONS OF FACT AND LAW.

Judge Clark's fundamental error of fact was his assumption that the mere doubling of the *Alaskan's* value between September, 1939 and mid-1942 "belies" a conclusion that "all enhancement of value due to the government's need for shipping * * * has been rigorously squeezed out." He apparently assumed that the doubling of value was connected with the lend lease program and government defensive efforts (R. III, 1700-1). He further assumed that there had been a "vast increase in value during and *due* to the defense efforts of 1939-1941" which the Commissioner had ignored.

Those assumptions of fact were, as we have shown, not only unsupported by the record but were actually contrary to it.* They can only be explained as misconceptions.

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* Also directly contrary to Judge Clark's assumptions is the fact that *during 1939/1941 freighter earnings more than doubled in the domestic intercoastal trade* where rates were regulated by the Interstate Commerce Commission and where no "defense" activities of the government are even claimed to have occurred. The earnings of respondent's vessels engaged in that trade were (before overhead, depreciation and federal taxes) $1.58, $2.23 and $3.27 per deadweight ton for the last quarters of 1939, 1940 and 1941, respectively. (Ex. 40, pp. 422, 426 and 428.)

In addition to being founded on misconceptions of fact, Judge Clark's dissent also seems to view the "enhancement clause" as authorizing deduction of any enhancement in the market value of ships "due to the defense efforts" regardless of whether such efforts or activities were in other markets or whether the enhancement arose from earnings fairly gained. Such a view is clearly incompatible with this Court's *Cors* decision which confirms market value as a measure of just compensation, except to the extent of any unfair or "hold-up" element therein created *solely* by the government's special demands and activities in the particular market for property taken.

Nowhere in his opinion does he specify any tangible misapplication of the Advisory Board's Rules and the decision of this Court in the *Cors* case to any facts in the record. In fact, it is impossible to obtain a notion of what concrete method of application of the enhancement clause he suggests should be made in this case. He merely states his view that the Commissioner "needed to make a definite finding as to enhancement of value in the statutory sense and the amount thereof as required in the *Cors* case" (R. III, 1703-4).

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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